IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NOS. 144, 145

D. B. HEINER, Individually and as Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

A. W. MELLON, Respondent.

D. B. HEINER, Individually and as Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE, and THE UNION TRUST COMPANY OF PITTSBURGH, Executors of the Estate of R. B. Mellon, Deceased, Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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Opinions Below.

The opinion of the District Court (R. 148) in the case of *Heiner v. A. W. Mellon* is reported in 14 F. Supp. 424. The opinion of the District Court (R. 163) in the case of *Heiner v. Jennie King Mellon et al.* is unreported but is identical, except for names and amounts, with the opinion in the former case. The cases were consoli-

dated for appeal and the opinion of the Circuit Court of Appeals (R. 709) is reported in 89 F. (2d) 141.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on March 15, 1937 (R. 712-713). The petitions for writs of certiorari were filed June 15, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Counter-Statement of Questions Presented.

1. Is any taxable gain realized during the liquidation of a partnership dissolved by the death of a partner, until the amount received by the partners from the sale of the assets exceeds the cost bases of the respective partnership interests?

2. When a partnership is dissolved by the death of one of the partners, are the surviving partners liquidating trustees and taxable as a separate entity?

3. Can the petitioner maintain a plea of estoppel when it appears that there has been no misrepresentation or concealment of any fact by respondents; that with full knowledge of the facts the Commissioner of Internal Revenue has assessed and petitioner has collected from the taxpayers, taxes on the same income in two different years; that neither the Commissioner of Internal Revenue nor the Federal Government has ever tendered return of the tax for either year; and that the Commissioner and the Government have shifted back and forth from one legal position to another to the detriment of respondents?

Counter-Statement.

On December 12, 1918, A. W. Mellon, R. B. Mellon and H. C. Frick, the only stockholders of A. Overholt

& Co. and West Overton Distilling Company, two corporations, each of which operated a distillery and owned large stocks of whiskey, formed two partnerships under the same names to take over the assets of the corporations. (Fdg. 8, R. 150, 15-19, 321, 365, 369; Ex. 3; R. 351 d). No additional stock of whiskey was to be manufactured or purchased. (Fdg. 13, R. 152).

The partnerships began business January 1, 1919 and were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were thereafter entered into. (Fdgs. 8, 9, R. 151, 321, 335).

Immediately after the dissolution of the partnerships the surviving partners began the liquidation of the two partnerships, and from that time, December 2, 1919, until January 31, 1921, acted as liquidating trustees in respect to the assets and businesses of the two former partnerships. (Fdg. 10, R. 15). In the process of liquidation no distilling operations were carried on and whiskey was sold by certificate until the end of 1920, at which time the surviving partners decided not to sell any more certificates unless they could sell all of the whiskey to some one person or concern. During 1920, bottling and storage operations were carried on as incidental to the sale of whiskey certificates and the withdrawal of the whiskey. (R. 354-55). On January 31, 1921, The Union Trust Company of Pittsburgh was appointed liquidating agent for the partnerships and all the remaining assets were transferred to it for that purpose (R. 19-32, Fdg. 10, R. 151). The distilleries and whiskey were finally sold in the year 1925. (R. 324, 337-38, 353-56).

The surviving partners kept the assets of the partnerships, including cash, separate from their individual interests, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash (R. 325, 388, admitted in the pleadings and in

evidence; Fdg. 15, R. 152; requested by petitioner, Request 9, R. 630, 654).

The books and records of the individual taxpayers were kept and their income tax returns were filed on the cash receipts and disbursements basis of accounting. (Fdg. 3, R. 149, 319, 333-34). The books and records of the two partnerships were kept on the accrual basis of accounting. (R. 159, 173, 511).

No distribution of any profits and no return of capital was made by the surviving partners or by the liquidating agent to the surviving partners as individuals or to the estate of the deceased partner during the year 1920 or during any year until after final liquidation in 1925. (Fdgs. 12, 14, 18, R. 152-53, 356-58, 366). Liquidation of the two partnerships was finally consummated and distribution was made by the liquidating agent to the surviving partners and to the estate of the deceased partner in the year 1925. (Fdg. 12, R. 152, 323, 337).

Partnership income tax returns for the year 1920 were filed on behalf of the two partnerships in liquidation by R. B. Mellon, one of the surviving partners. The returns disclosed that the partnerships were in liquidation because of the death of Mr. Frick, reported the income realized from bottling, storage and sale of barrels, and computed tax thereon, and also disclosed a computed profit on the sale of whiskey certificates which was not reported as income but claimed to be the proceeds from the conversion of capital assets and not reportable as income until such proceeds exceeded the cost bases to the former partners of their partnership interest. (Exs. 3, 4; R. 351, 352).

On the individual income tax returns filed by the surviving partners for 1920, each took up and returned as income his undistributed share of the reported income of A. Overholt & Co. and West Overton Distilling Company from bottling, storage, etc. (R. 326, 340). No

income from the sale of whiskey certificates was returned by the individuals for 1920.

In 1927 the Commissioner assessed additional taxes for 1920 against the surviving partners, aggregating with interest $202,502.20 against A. W. Mellon and $187,887.17 against R. B. Mellon, which were paid under written protest on April 2 and May 19, 1927, respectively. (R. 320, 335).[1] These additional taxes were assessed on the theory that a taxable profit was realized in 1920 from the sale of whiskey certificates. (R. 327, 340, 387, 388, 395-97). (Fdgs. 5, 6, 7, R. 150).

The sum received from the sale of whiskey certificates by the partnerships in 1920 and prior thereto was less in amount than the cost of the assets of said companies to the partners, H. C. Frick, A. W. Mellon and R. B. Mellon. (Fdg. 23, R. 154).

On or about November 14, 1928, the Commissioner reversed his ruling of 1927 and held that the liquidation of the two partnerships was consummated in 1925, that the reported profits and losses for 1924 should be eliminated, and that income for 1925 should include the difference between the cost values of the partners' interests as of December 2, 1919 and the amounts received in final liquidation, including all reported and alleged profits and losses for the years 1920 to 1924, inclusive. On this basis deficiencies for the year 1925 were accordingly assessed by the Commissioner and paid by the surviving partners. (Fdgs. 19, 20, R. 153-54, 328-31, 341-42, 345; Exs. BB, CC; R. 495, 501). In assessing the tax for 1925, the Commissioner included in income the alleged profit from the sale of whiskey certificates in 1920 on which a tax had previously been assessed by him for the year 1920, and paid by the surviving partners in April and May, 1927, as above stated. (Fdg. 24, R. 155).

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[1] Payment under written protest was admitted in the pleadings and read into evidence without objection.

Claims for refund of the 1920 tax were filed by the surviving partners on March 19, 1929 (Fdg. 21, R. 154, 331, 346), four days after the Commissioner had issued his final deficiency letter for the year 1925 in which he proposed to assess the tax on all the income from the liquidation in the latter year. (Fdg. 20, R. 154).

The claims for refund of the 1920 tax were rejected on April 6, 1934 (R. 402; Ex. V, R. 479), more than five years after the filing thereof and two years after these suits had been instituted. (Fdg. 22, R. 154).

On July 16, 1931, more than two years after the filing of the claims for refund of the 1920 tax, the Commissioner again reversed his position, and as to the year 1924, included in the tax computation of the surviving partners the profits and losses realized from bottling, storage, etc., during the liquidation of the two former partnerships. (R. 481-82).

Protective claims for refund of income tax for 1925 were filed by both taxpayers on or about May 11, 1932 (Exs. FF, GG; R. 508-10), but the Commissioner, notwithstanding the fact that he has collected taxes on the same income in both 1920 and 1925 has not acted on the claims nor tendered any refund of tax for either year. There is no evidence as to why the claims have not been acted upon and the Court made no finding of fact on this point.

Additional Facts With Respect to Defense of Estoppel.

The question of estoppel arises only in the event that the income in question was taxable in 1920. The Trial Court made no special findings relating particularly to this defense as it held the question to be moot in view of its decision that no taxable income was realized from the sale of whiskey certificates in 1920.

The fact that the partnerships were in liquidation in 1920 was made known to the Commissioner on the

income tax returns filed by the two dissolved partnerships. (Exs. 3, 4; R. 351-52). The returns for both former partnerships and of both the surviving partners were examined and the books of account and the records audited at the same time by the same Revenue Agent, Albert W. Smith, and his reports on all four returns are dated November 8, 1921, Exhibits C, D, K, L. (R. 444-50). These reports on the former partnerships refer to each other. The return filed by A. Overholt & Co. states that it is a "partnership in liquidation," and on a special schedule attached thereto, the following appears:—

> "The partnership of A. Overholt & Co. consisted of A. W. Mellon, R. B. Mellon and Henry C. Frick and was created on December 30, 1918, for the purpose of liquidating the assets of A. Overholt & Co., a Pennsylvania corporation.
>
> "Mr. Frick died on December 4, 1919, and under the laws of the State of Pennsylvania, Messrs. A. W. and R. B. Mellon were, as surviving partners, required to carry on the liquidation of the assets of the copartnership.
>
> "On February 1, 1921, Messrs. Mellon, as liquidating partners, transferred all of the assets, real, personal and mixed of the copartnership, to The Union Trust Company of Pittsburgh, as liquidating agent." (R. 351 d).

The return of West Overton Distilling Company (Ex. 4; R. 352) states, in answer to question 3 (b), that it is "in liquidation."

The Revenue Agent's report on A. Overholt & Co. for 1920 (Ex. K; R. 448) stated that the taxpayer had set aside a portion of profits under the caption of liquidation, claiming it as a return of capital.

The legal point that the surviving partners became as a matter of law liquidating trustees and, as such, taxable as a separate entity, was argued in a brief filed on

November 22, 1932 (Ex. LLL; R. 572), and then only after the Commissioner had refused to act upon the claims for refund for 1925, which were filed as a protective measure. (Exs. FF, GG; R. 507-10).

There was no concealment or misrepresentation of any fact. The Commissioner knew of Mr. Frick's death and had full knowledge that A. W. Mellon and R. B. Mellon were liquidating the former partnerships; he made a settlement with the Frick Estate on the basis that the so-called profits of both former partnerships for the year 1920 did not constitute taxable income in that year, but did constitute taxable income in the year 1925 and the Frick Estate paid the tax on that basis. (Fdg. 16, R. 152, 325-26, 339, 600-15; Ex. 6).

The Commissioner's inconsistent determinations with respect to the net income of A. Overholt & Co. and West Overton Distilling Company during the period of liquidation are respectively set forth in letters written by him as follows:

1. All profit, whether from bottling or otherwise, was taxable income in 1920. (Letters of February 9, 1922; Exs. C, D; R. 444, 446).
2. No profit, whether from bottling or otherwise, was realized until final liquidation. (Letter of September 14, 1927, Ex. 6; R. 605, Fdg. 16).
3. No profit, whether from bottling or otherwise, was realized until final liquidation. (Letter of November 14, 1928, R. 328, 341-42, Fdg. 19).
4. All profit was realized upon final liquidation. (Notice of Deficiency for 1925, March 15, 1929, Exs. BB, CC; R. 491, 497, Fdg. 20).
5. Profit on sale of whiskey was realized and taxable in 1920. (Letters dated April 16, 1932, Exs. T and U; R. 475-77; letters dated February 27, 1934 and April 6, 1934, Exs. W and V;

R. 479-80). See also similar letters to A. W. Mellon (R. 401-02).

On or prior to December 31, 1925, and prior to the date of the additional assessments for both 1920 and 1925, all of the moneys, properties and assets of whatever nature of A. Overholt & Co. and West Overton Distilling Company were distributed to the surviving partners and the Estate of H. C. Frick, leaving said partnerships with no assets or property. (R. 390, 398). During the liquidation, various sums of money were loaned by the trustees to the partners and the estate of the deceased partner. These loans were carried on the books of the partnership as bills receivable and repayments were duly credited on the same record. Any balance due on the loans was repaid when the partnership property was sold. The Trial Judge, in his opinion, held that the sums so advanced were loans and were not paid out in distribution of the gains of the partnerships (R. 159).

ARGUMENT.

The Decision of the Court Below Is Not in Conflict With the Decision of the Circuit Court of Appeals for the First Circuit in Earle v. Commissioner, 38 F. (2d) 965.

The *Earle* case holds only that income earned prior to dissolution by death is taxable income. Of course income earned prior to death is always taxable income even though it becomes a capital asset to the estate on death. To be comparable to the *Earle* case, the items in question here would have to be income earned prior to the death of Mr. Frick. Mr. Frick died in 1919 and the alleged income in question accrued in 1920, a different taxable year. The admitted profits at issue in the *Earle* case arose from a sale made on June 14, 1923, prior to the death of a partner who died on July 1, 1923. Later in 1923 all the assets of the partnership were taken over in a non-taxable exchange by a corporation which assumed all the debts. The partnership base became the base of the corporate stock. The facts in the case (practically conclusive on appeal), are set forth in the findings of the Board (15 B. T. A. 668, 669, 670). In the opinion of the Board (Phillips, Member), we find this comment (p. 671):—

> "*It appears that the net income of the partnership * * * was some $70,000, all of which had been earned prior to the death of Eugene V. Earle. The partnership was not only terminated in 1923 by the death of this partner, but its affairs were liquidated in that year by transferring all its assets to a corporation, which assumed all of the obligations and liabilities of the partnership.* This transfer, however, was not of the nature which could give rise to a taxable gain or deductible loss. Section 202,

Revenue Act of 1921. The taxable year of the partnership being the same as that of the partners, the liquidation having been accomplished within the year without gain or loss, and *all of the profits of the year having been accrued and received by the partnership prior to its termination by the death of a partner, there are not here involved those questions which arise where the partnerships and the individual partners have different accounting periods, where losses are sustained during the period of liquidation, or where liquidation is not completed within the taxable year.*" (Italics ours).

The above statement distinguishes the case. All else is *obiter* or involves other questions. The Circuit Court of Appeals took the same view as the Board. There is therefore no conflict of decisions.[1]

No Taxable Income Was Realized in 1920.

The Trial Court found that no taxable gain was realized in 1920 from the sale of whiskey certificates for the reasons:—(1) The partnerships were dissolved by the death of Mr. Frick in 1919, and were in process of liquidation and the whiskey sold in 1920 was a capital asset from which no gain was realized until the proceeds of sale exceeded the cost of the interests of the partners; (2) The surviving partners were trustees with the duty of accounting upon the termination of the liquidation which was not and could not reasonably have been completed in 1920 or in fact until 1925 (Fdg. 14, R. 152-167).

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1 In the petition for writ of certiorari in the case of *United States v. Grahame Wood et al., Executors of the Estate of George Wood, Deceased* (filed five years after the decision in the *Earle* case above cited) the Solicitor General admitted that the same question was involved in the Wood case as is involved in the instant cases. Certiorari was denied November 25, 1935, 296 U. S. 643.

It held that the question whether or not the surviving partners were taxable as a separate entity, *i. e.,* as trustees, was moot in view of its finding that no taxable gain was realized in 1920 upon the sale of whiskey certificates. (R. 156-62).

The Circuit Court of Appeals held that no gain was realized until such time as each surviving partner and the representative of the estate of the deceased partner respectively received an amount in excess of the cost to him of his partnership interests and of the undistributed net income on which the income tax had been paid; and that profit or loss could not be determined until the proceeds should exceed the base calculated in accordance with Article 1570 of Regulations 45.

The judgments of the District Court are fully supported by the following: (1) The Commissioner's own determinations in 1928 and 1929 that no profit was realized until final liquidation in 1925. (Fdgs. 19, 20, R. 153-154, 328-31; Exs. BB, CC, R. 491, 497). (2) A similar final determination made by the Commissioner with respect to the estate of the deceased partner. (Fdg. 16, R. 152, 325-26, 600-13). (3) Article 1570 of Regulations 45, promulgated under the Revenue Act of 1918 and still in force, which provides:

> "When a partner retires from a partnership, or it is dissolved, he realizes a gain or loss measured by the difference between the price received for his interest and the cost to him or (if acquired prior thereto) the fair market value as of March 1, 1913, of his interest in the partnership, including in such cost or value the amount of his share in any undistributed partnership net income earned since February 28, 1913, on which the income tax has been paid."

Article 1570 of Regulations 45 was first promulgated under the Revenue Act of 1918 and has appeared in all subsequent Regulations, namely: Regulations 62, Article 1570; Regulations 65, Article 1603; Regulations 69, Article 1603; Regulations 74, Article 604; and Regulations 77, Article 604.

This Regulation is not in conflict with any statutory provision relating to the question. It is within the intent of the taxing statute and does no violence to the letter or spirit of the Act. It was construed and applied by the Commissioner himself in accordance with our position in determining and settling the tax against the Estate of H. C. Frick, one of the partners, for the years 1920 and 1925, and in assessing and collecting tax from respondents for the year 1925. It recognizes another instance where tax is deferred. Deferment of tax is not uncommon. It is recognized on long-term contracts, on installment sales, on liquidations of corporations, on reorganizations of corporations and numerous exchanges of property and it was recognized in *Burnet v. Logan,* 283 U. S. 404, 75 L. Ed. 1143.

The statute has been reenacted without change. The Regulation therefore ought not to be disturbed, unless plainly wrong. *Universal Battery Co. v. United States,* 281 U. S. 580, 583, 74 L. Ed. 1051; *Northwest Utilities Securities Corp. v. Helvering,* 67 F. (2d) 619, 621; *Robertson v. Downing,* 127 U. S. 607; *Edwards' Lessee v. Darby,* 12 Wheat. 206; *Brewster v. Gage,* 280 U. S. 327, 74 L. Ed. 457, 462, and cases there cited.

By successive reenactments of the statute without change, the Regulation has become law. *Massachusetts Mutual Life Insurance Co. v. United States,* 288 U. S. 269; *Old Colony R. R. Co. v. Commissioner,* 284 U. S. 552; *Poe v. Seaborn,* 282 U. S. 101; *Wisconsin v. Illinois,* 278 U. S. 367, 413.

Article 71 of Regulations 45 provides that "The term 'gross income' as used in the act does not include those items of income exempted by statute or by fundamental law." *Law of Federal Income Taxation,* Paul & Mertens, Vol. 1, § 5.19. A return of the cost of property or capital invested in property has an exempt status resting in "fundamental law."

The facts in this case are directly within the provisions of Article 1570, and under the Regulation promulgated by the Treasury Department the base for determining gain or loss to respondents was the cost of their partnership interests plus the amount of their share in any undistributed partnership net income on which the income tax had been paid. The sales of certificates in 1920 were not "in the ordinary course of business" as stated in petitioner's brief (p. 6) but were made in partial liquidation of the partnership assets.

The argument that if the decision be allowed to stand, it will constitute a dangerous precedent by affording a "loophole for tax evasion" is unwarranted. There are no facts in the record nor in the findings of the Court to support such a statement. There was no evidence of any intention to avoid payment of a tax, let alone of evasion. The remedy, if any is needed, is a change in the rule established by the regulation and is legislative and not judicial. This argument, here introduced for the first time, is untenable and without merit. The fact is that respondents paid a tax on the same income in two separate years when assessments were made by the Commissioner. Surely an attempt to recover one of the taxes so paid cannot be called "tax evasion." This case turns on its own particular facts and the decision does not present an opportunity either for the avoidance or evasion of taxes by others in the future. There is no principle involved

in this case other than the application of a regulation promulgated by the Commissioner himself.

As Surviving Partners Respondents Were Trustees to Liquidate the Partnerships and Taxable as Such.

Mr. Frick died on December 2, 1919. Under the Pennsylvania statutes, A. W. Mellon and R. B. Mellon, the surviving partners, then became liquidating trustees for the partnerships.

The Uniform Partnership Act is in force in Pennsylvania: Act of March 26, 1915, P. L. 18, Part VI, Section 31. Under Section 31 of the Act, the death of Mr. Frick dissolved the partnerships (Appendix, page 26). See also *Froess v. Froess,* 284 Pa. 369, 373. The partnership agreements contemplated dissolution by the death of a partner (Exs. A, B; R. 15, 19, 321).

The Articles of Agreement appointing the liquidating agent dated January 31, 1931, show that the surviving partners recognized that the partnership was dissolved and in liquidation (Exs. C, D; R. 19, 23).

While under the Act (Sec. 30, appendix page 26) the partnerships were not terminated by Mr. Frick's death, the surviving partners became liquidating trustees with the duty of accounting as trustees on completion of the liquidation. *Froess v. Froess,* 284 Pa. 369; 289 Pa. 69; *Brown's Appeal,* 89 Pa. 139; *Eisenlohr's Estate,* 258 Pa. 431.

As such liquidating trustees, the surviving partners were not required to liquidate and wind up the affairs of the partnerships at once but were entitled to a reasonable time within which to do so and petitioner does not contend that this was not done. There were large contingent liabilities existing in 1920 which prevented distribution at that time. (Fdg. 14, R. 152-167, 369, 373-4, 379).

Distribution could not be made until all debts and liabilities contingent or otherwise had been paid and satisfied, and neither the surviving partners nor the estate of the deceased partner could be taxed until final distribution. Sections 40 and 41, Uniform Partnership Act (Appendix pages 26-27). *Herron v. Wampler,* 194 Pa. 277; *Powell v. Bennett,* 30 N. E. 518 (Ind. 1892); *Lawson v. Dunn,* 57 Atl. 415 (N. J. Equity, 1904); *R. W. Archibald, Jr.,* 4 B. T. A. 483.

But even were we to admit that the partnerships realized taxable income in 1920 from the sale of whiskey certificates, it was income to the liquidating trustees and taxable to them as a separate entity. *Wooley v. Malley,* 30 F. (2d) 73; certiorari denied 279 U. S. 860; *Merchants Loan & Trust Co. v. Smietanka,* 255 U. S. 509, 65 L. ed. 751. Assessment and collection of such a tax is now barred by lapse of time. (R. 398).

There Is No Estoppel.

The partnership returns filed gave every fact necessary to raise the question of a trust and put the Commissioner on notice. The Revenue agents made examinations of the books and records of the partnerships and reported to the Commissioner. He had full information as to the situation. There was no conduct, act, language or silence on the part of respondents amounting to misrepresentation or concealment of material facts. Consequently there can be no estoppel. *Brant v. Virginia Coal & Iron Co.,* 93 U. S. 327, 335; *Southwestern Investment Co.,* 19 B. T. A. 30, and authorities there cited; *Central Market Street Co.,* 25 B. T. A. 490, appeal dismissed by C. C. A. 3rd, Nov. 11, 1933.

Furthermore there can be no estoppel where both parties labor under a mutual mistake of law. The Commissioner knew that Mr. Frick had died and that the partnerships were in liquidation. He chose to treat the

surviving partners, acting as liquidating trustees, and the estate of the deceased partner as members of a continuing partnership, and assessed and collected taxes on that basis. He is chargeable with knowledge of the law and, with knowledge of the facts, it is his duty to make his own interpretation of it. He is required to investigate, examine and audit returns and determine the correct tax. He has no right to rely on a taxpayer's statement or understanding or position as to the law of the case. *Tidewater Oil Co.*, 29 B. T. A. 1208; *Helvering v. Brooklyn City Railroad Co.*, 72 F. (2d) 274; *Glavey v. United States*, 182 U. S. 595; *United States v. Andrews*, 240 U. S. 90; *Dixon County v. Field*, 111 U. S. 83.

In *Helvering v. Salvage*, 297 U. S. 106, this Court said:

> "Further, that the failure to disclose 1922 taxable gain apparently resulted from an innocent mistake of law; there was no false representation of fact; nothing gave support to the claim of estoppel."

The taxpayer does not estop himself by failure to assert his full rights. *Bowers v. New York Trust Co.*, (C. C. A. 2) 9 Fed. (2d) 548, 551, and the form of return used is immaterial if the taxpayer acts in good faith and makes full disclosure. *Hartford Trust Co. v. Eaton*, (C. C. A. 2) 34 Fed. (2d) 128.

In order to assert the claim of estoppel, the petitioner must prove that he was misled by his reliance on the conduct of the other party to change his position to his own detriment. This he cannot do in the present case. Neither the Commissioner nor the petitioner relied on any representation by the respondents. Both were in complete possession of the facts, there was no misrepresentation or concealment and the change of position by the Commissioner was not made in reliance

on the position taken by the appellees, but on the contrary was directly opposite to their position. When in 1928 and 1929 he determined that the 1920 income should be taxed in 1925 as capital gain, he was changing to the position originally taken by the taxpayers when the returns for 1920 were filed, with which position he refused to agree at that time and on the contrary required the payment of an additional tax for that year. He never changed his position as the result of any position taken by the respondents, either as a matter of fact or of law. He is the author of his own misfortune and cannot escape the consequences by now attempting to cast the burden upon the respondents. If the Commissioner, after collecting a tax on identical income in two years, had not changed his position and attempted, contrary to his duty and the exercise of good faith, to collect and retain these taxes for both years, respondents would not have raised the question that the income, if any, in 1920 should have been taxed to the liquidating trustees as separate taxable entities.

The equities are all with the respondents. The Commissioner, having collected tax on the same income in two years, and refusing to refund the tax for either year, is not in a position to raise the defense of estoppel when respondents say that the tax for 1920 should have been assessed against the liquidating trustees. He cannot disaffirm liability to refund the 1920 tax while retaining the benefits of the collection in 1925, particularly when the respondents have accepted the determination of the Commissioner that the income in question was taxable in 1925. The claims for refund of the 1920 tax were filed four days after this determination and show such acceptance. (Exs. 1, 2; R., 349-50). Moreover, the Commissioner did not revert to his original position that taxable profits were realized in 1920 until after this suit

was brought. It was then too late for him to do so. *Ohio & Mississippi Railway Co. v. McCarthy,* 96 U. S. 258, 268, 25 L. ed. 693, 696.

The Case of Stone v. White, Decided by This Court on May 24, 1937, Is Clearly Distinguishable From the Present Case.

The decision in *Stone v. White* was based solely upon equitable principles, the Court saying that there was only one tax due and the question was merely whether the tax should be paid by the trustee or by the beneficiary.

In the present case, a tax on the same income has been paid twice by respondents, due to two different assessments made by the Commissioner on the same income at different times and for different years. In *Stone v. White* an effort was being made to avoid payment of any tax on the income, either by the trustees or by the beneficiary.

In the present case, there is no identity of interest between the trustee and the *cestui que trust* as there was in *Stone v. White,* for the respondents as surviving partners were not entitled to all the income of the trust. Cf. *Sewell v. United States* decided by the Court of Claims, June 7, 1937, 374 C. C. H. ¶ 9374. The respondents are not the "apparent" as well as the "real" taxpayers as stated in petitioner's brief (p. 22). The Frick Estate was the owner of a one-third interest in the partnerships and hence the beneficiary to the extent of one-third of the assets, income and proceeds of sale. Moreover the Frick Estate is now out of the picture, a settlement having been made with it by the Commissioner in 1927 and the entire estate was thereafter distributed. Therefore any tax now assessed on the trust would have

to be paid by the two remaining partners, without contribution from the estate.

In *Stone v. White,* this Court said:

> "No injustice is done to the trustees or the beneficiary by withholding from the trustees money which in equity is the beneficiary's and which the Government received in payment of the tax which was hers to pay. A single error on the part of the taxing authorities, excusable in view of persistent judicial declaration, has caused both the underassessment of one taxpayer and the overassessment of the other."

This quotation does not apply to the present case, as an injustice will be done to the surviving partners as trustees if they are not permitted to recover the tax paid in 1920 and consequently to settle the tax claim on the same basis as the Frick Estate, namely—that the income was taxable in 1925. Nor does the reference to the error of the taxing authorities being excusable in view of judicial declarations, apply to the present case as neither the petitioner nor the Commissioner claims to have relied on any decision of any court. With full knowledge of the facts, they changed their position twice and assessed a tax on the same income in two different years, placing a double tax burden on the respondents. In this instance the taxing authorities are to blame and not the respondents as the double payment was due to the double assessment; they are the sole cause of the situation; and if respondents are not entitled to recover, there will be an unjust enrichment to the Government, which has at *all times declined and still declines to refund or tender refund of the tax, paid on the same income, either for 1920 or for 1925* although in justice and equity a refund should be made for one of the years. *Bull v. United*

States, 295 U. S. 247. The running of the Statute of Limitations in this case was not due to any fault of the respondents but solely to the delay of the taxing authorities in making up their minds as to the year in which the income was taxable, the record showing that the claim for refund of the 1920 tax, for which these suits were brought, was not filed until after the Commissioner assessed a tax for 1925 on the same identical income and was not rejected until two years after the present suits were instituted. The equities in this case are all on the side of the respondents and the principles stated in *Stone v. White* support their position.

The Findings of the Court Which Are Questioned by Petitioner Are Fully Supported by the Evidence.

Finding 24 (R. 155, 169) that the same profits have been taxed in both 1920 and 1925 is supported by direct evidence. Paragraph 19 of the statements of claim, not being denied by the affidavits of defense, was read in evidence *without objection* from petitioner. This stated clearly that the income was taxed in 1920. (R. 327, 340). Paragraph 28 of the statements of claim, not being denied by the affidavits of defense, was read and admitted in evidence, the only objection by petitioner being that the paragraph was irrelevant and immaterial. That paragraph states that the same income, $281,779.95 and $52,814.28 of A. Overholt & Co. and West Overton Distilling Company, respectively, was included in taxable income of each respondent for the year 1920 and again for the year 1925. (R. 332, 347).

Finding 23 (R. 154, 169) that the base exceeded the alleged profit in 1920 is based on the Commissioner's own determination. The alleged profit from the sale of whiskey certificates in 1920, as computed and taxed by

the Commissioner to each of the surviving partners for that year was \$233,429.21 from A. Overholt & Co. (R. 387), and \$46,853.73 from West Overton Distilling Company (R. 388). The cost basis of each former partner's interests in the partnerships was determined by the Commissioner to be \$990,775.53 and \$60,505.66, respectively (Exhibits BB, CC, R. 495-96, 501-02). The petitioner introduced no evidence to controvert those figures and they stand unchallenged as direct support for the Court's findings.

Conclusion.

The judgments in the present cases are supported by special findings, and the special findings are supported by ample evidence; there are no conflicts of decisions; the judgments follow a Regulation of many years standing; there is no question of great public importance and no question involving the constitutionality of any act of Congress.

THEREFORE, it is respectfully submitted that the petition for writs of certiorari should be denied.

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REED, SMITH, SHAW & MCCLAY,
Of Counsel.

July, 1937.

APPENDIX.

Revenue Act of 1918, c. 18, 40 Stat. 1057:

"Sec. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

"The partner shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the partnerships."

"Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

"(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

"(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

"(3) Income held for future distribution under the terms of the will or trust; and

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

"(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, * * *"

"Sec. 225. That every fiduciary (except receivers appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for the individual, estate or trust for which he acts (1) if the net income of such individual is $1,000 or over if single or if married and not living with husband or wife, or $2,000 or over if married and living with husband or wife, or (2) if the net income of such estate or trust is $1,000 or over or if any beneficiary of such estate or trust is a non-resident alien, stating specifically the items of the gross income and the deductions and credits allowed by this title. Under such regulations as the Commissioner with the approval of the Secretary may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable

him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

"Fiduciaries required to make returns under this Act shall be subject to all the provisions of this Act which apply to individuals."

"Sec. 200. That when used in this title—

* * *

"The term 'fiduciary' means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, trust or estate; * * *"

Treasury Regulations 45:

"Art. 1570. Readjustment of partnership interests.—When a partner retires from a partnership, or it is dissolved, he realizes a gain or loss measured by the difference between the price received for his interest and the cost to him or (if acquired prior thereto) the fair market value as of March 1, 1913, of his interest in the partnership, including in such cost or value the amount of his share in any undistributed partnership net income earned since February 28, 1913, on which the income tax has been paid. If, however, the partnership distributes its assets in kind and not in cash, the partner realizes no gain or loss until he disposes of the property received on distribution. See article 1566. Whenever a new partner is admitted to a partnership or any existing partnership is reorganized, the facts as to such change or reorganization should be fully set forth in the next return of income, in order that the Commissioner may determine

whether any gain or loss has been realized by any partner. See also article 1563."

"Art. 1521. *Fiduciary.*—'Fiduciary' is a term which applies to all persons that occupy positions of peculiar confidence toward others, such as trustees, executors and administrators, and a fiduciary for income tax purposes is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another as in the case of receivers. A committee of the property of an incompetent person is a fiduciary. See sections 219 and 225 of the statute and articles 341-344 and 421-425."

Uniform Partnership Act (Act of March 26, 1915, P. L. 18, Purdon's Pa. St. Ann. Title 59):

"Section 30. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

"Section 31. Dissolution is caused:

* * *

"(4) By the death of any partner;

* * *

"Section 33. Except so far as may be necessary to wind up partnership affairs, or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership.

* * *

"Section 40. In settling accounts between the partners after dissolution, the following rules shall

be observed, subject to any agreement to the contrary;

* * *

"(b) The liabilities of the partnership shall rank in order of payment, as follows:

"I. Those owing to creditors other than partners,

"II. Those owing to partners other than for capital and profits,

"III. Those owing to partners in respect of capital,

"IV. Those owing to partners in respect of profit.

* * *

"Section 41.

* * *

"(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section, the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property."